IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 5074 of 2002

For Approval and Signature:

HONOURABLE MR.JUSTICE AKIL KURESHI

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1 Whether Reporters of Local Papers may be allowed ` to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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CHOWDHARY VINODKUMAR BABARAM &CO. & 5 - Petitioner(s)
Versus
SARDARGANJ MERCANTILE CO.OP. BANK LTD. - Respondent(s)

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Appearance :
MR SHIRISH JOSHI for Petitioner(s) : 1 - 6.
MR TUSHAR MEHTA for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE AKIL KURESHI

Date : 07/08/2006

ORAL JUDGMENT

1. In the present petition, the petitioners have challenged the order dated 11th September,1995 passed by the Board of Nominees as upheld by

the judgment and order dated 7th October 1999 passed by the Cooperative Tribunal in Appeal No.363 of 1995 and the order dated 20th August 2001 passed by the Tribunal in Review Application filed by the petitioners herein.

2. Short facts leading to the petition are that the respondent, the Sardarganj Mercantile Cooperative Bank Limited (hereinafter to be referred to as “the respondent Bank”) had filed Lavad Suit No.1217 of 1986 against the petitioners. In the said suit, the respondent Bank had claimed recovery of a sum of Rs.4,03,302/- from the petitioners. The Lavad Suit No.1217/86 was later on renumbered as Lavad Suit No.237/90 upon transfer.

3. Broadly stated, the case of the respondent Bank against the petitioners was that petitioners Nos.1 to 3 for the purpose of expanding their business activities had availed of cash credit hypothecation upto a ceiling of Rs.1 lac from the respondent Bank. Respondent Nos.4 to 6 had stood as guarantors for the said transaction. In addition thereto, petitioners Nos.1 to 3 were

also given the facility of pledge cash credit by the respondent Bank in the year 1983 for a sum of Rs.5 lacs. For the said purpose, the petitioners had pledged its goods such as Isubgul, mustard seeds, cumin seeds etc. The limit was later on increased to Rs.10 lacs. The petitioners had agreed to pay 18 per cent interest on cash credit facility and 16 per cent to 18 per cent on the pledge cash credit facility. One of the conditions between the parties was that the petitioners would be entitled to avail of the pledge cash credit facility upon a maximum of 60 per cent of the value of the goods so pledged. It was further the case of the respondent Bank before the Board of Nominees that under different heads, the petitioners had to repay a sum of Rs.4,03,302/- to the respondent Bank as on the date of filing of the suit. This sum included the amount of agreed interest till that date. Since the Bank found that its debt is not being repaid and is likely to become doubtful debt, the Bank filed the said Lavad Suit against the petitioners.

4. The petitioners had appeared before the Board of Nominees and resisted the Lavad suit. On 16.1.87, the petitioners filed an affidavit stating, inter alia, that through an appointment of Court Commissioner and the order of the Board of Nominees, the respondent Bank has obtained attachment of the goods of petitioners Nos.1 to 3 before the judgment, that the petitioners had obtained an order dated 12.1.87 from the Board of Nominees permitting them to lift 68 bags of wheat valued at Rs.13,000/- from the godown where the Bank seals were applied. At the time of taking physical delivery of said 68 bags of wheat on 13.1.87, the petitioners realized that the goods pledged by the petitioners such as Isabgul, Mustard seeds, cummin seeds etc. are missing. The petitioners, therefore, called upon the respondent Bank through a communication dated 14.1.87 to account for the same. According to the petitioners, the goods were valued at Rs.5,28,400/-. Thus the petitioners contended before the Board of Nominees that the entire stock of goods of the

petitioners was sold away by the respondent Bank without any intimation to the petitioners.

4.1 The respondent Bank filed counter affidavit to the said statement of the petitioners on 17.7.87. The Bank denied the allegations made by the petitioners. The Bank denied that goods were sold away behind the back of the petitioners and contended that the goods were sold through auction with prior intimation to the petitioners. The Bank also indicated that through public auction, a sum of Rs.1,42,786/- was realized by the Bank and the said sum was duly credited in the account of the petitioners and 24 bags of mustard seeds were still lying in the godown unsold.

5. It was on the basis of these factual controversies that the Board of Nominees proceeded to decide the Lavad Suit. By an order dated 11.9.95, the Board of Nominees held that the petitioners are required to pay to the respondent Bank a sum of Rs.1,27,477 with 18.5 per cent interest from 1.4.86 till realization. The Board of Nominees further directed that the

petitioners Nos.1 to 3 shall pay a sum of Rs.2,77,825/- to the respondent Bank along with interest at the rate of 16.5 per cent from 1.4.86 till the actual payment.

6. The petitioners preferred appeal No.363/95 before the Cooperative Tribunal. The Tribunal, however, by its judgment dated 7th October 1999 rejected the appeal of the petitioners. Review Application No.13/99 filed by the petitioners also came to be rejected by the order dated 28.8.2001. The petitioners have, therefore, filed this petition challenging the said orders passed by the courts below.

7. I have heard learned advocates Shri Joshi for the petitioners and learned advocate Shri Tushar Mehta for the respondent Bank.

8. With respect to the respondent bank giving cash credit facility to the petitioners as well as further credit on pledging of goods, there is little dispute. Petitioners Nos.1 to 3 had availed of such facilities from the Bank. The Bank was charging agreed interest from the petitioners for the said facilities. It is

also not in dispute that at some stage there was substantial amount outstanding from the petitioners to respondent Bank. With respect to the broad quantification of the amounts claimed by the respondent Bank from the petitioners in the Lavad suit, there is no serious dispute. The dispute that has been raised by the petitioners which calls for serious consideration was whether the goods pledged by the petitioners with the respondent Bank and which was within the custody and possession of the respondent Bank was sold away by the Bank without the knowledge of the petitioners and without accounting for the sale proceeds thereof.

9. The petitioners had before the Board of Nominees built up a systematic case of the respondent Bank having misappropriated the goods without any intimation to the petitioners. In fact, it was the case of the petitioners that the respondent Bank had exclusive possession and access to the godown in which such goods of the petitioners were lying. Initially, the petitioners had pledged the goods with the bank

and upon repayment of the amounts, the Bank would permit the petitioners to lift the portion of the stock and the petitioners then sell it in the market. Subsequently, the Bank had applied and it was granted attachment before judgment by the Board of Nominees. Through combination of these measures, the respondent bank had the exclusive control over the goods of the petitioners. It is the case of the petitioners that for the first time in January 1987 when the petitioners were granted permission by the Board of Nominees to lift 68 bags of wheat valued at Rs.13,000/- and when the petitioners visited the godown that they came to know that their goods are no longer lying in the godown. The petitioners immediately intimated the Bank about the missing goods. The Bank did not join issue at that stage. Much later on before the Board of Nominees in July 1987, for the first time, the Bank revealed its stand that the goods were much earlier disposed of through public auction. Thus, it is the case of the petitioners that the Bank had without authority

and without intimation to the petitioners disposed of its properties and never accounted for the sale proceeds thereof.

10. The petitioners also built up a case before the Board of Nominees that if the stand of the Bank that the goods were already sold off and accounted for was correct, the Bank could have revealed this in its Lavad suit. At no stage, the Bank has made such disclosure either before the Board of Nominees or in the correspondence with the petitioners. Thus the petitioners urged before the Board of Nominees that the stand of the Bank that the goods were actually accounted for through sale was not correct.

10.1 The petitioners have also placed heavy reliance on the evidence on record. The petitioners relied on the cross-examinations of the witness of the Bank one Shri Jaswantlal Virchandbhai Patel who was examined as witness of the Bank.

11. I have heard the learned advocates appearing for the parties at considerable length and I have also perused the material on record.

12.It is not in dispute that in the Lavad suit, the respondent Bank never disclosed that the goods pledged by the petitioners with the Bank were already sold even before filing of the suit. In response to the communication of the petitioners made in January 1987 also, the respondent Bank did not right away contend that the goods were sold with the knowledge of the petitioners. In fact, the petitioners had immediately sought to bring to the notice of the Bank that goods worth lacs of rupees were found missing from the godown when the petitioners went to take possession of 68 bags of wheat as permitted by the Board of Nominees. It was only for the first time in July 1987, through an affidavit before the Board of Nominees that the Bank disclosed its stand in this regard.

13. Additionally, I have also found that the witness of the Bank had made certain important admissions before the Board of Nominees. In his cross-examination, witness of the Bank Shri Jawantlal Virchandbhai Patel had stated that on 17.3.86 the Bank had insured the goods for a sum

of Rs.6 lacs. He also stated that on 30th January 1985, the Bank found out that some of the bags of mustard seeds were missing. He, however, conceded that no police complaint in this regard was filed by the Bank. In fact, he suggested that the petitioners themselves had lifted some of the goods. However, he sought to suggest that the petitioners were allowed to lift the goods without payment of any money on 30th January 1985. He, however, admitted that in the reply dated 17.7.87, the Bank did not disclose that the petitioners were permitted to lift the goods. He sought to produce the delivery memo of 30th January 1985, but agreed that on 17.7.87 when the Bank filed its reply, the same was not produced before the Court. He stated that the same was done under legal advise. He admitted that the possession of the godown was handed over to the petitioners only on 20th June 1990.

14. One may also take note of the fact that immediately upon the petitioners coming to know about the missing stock, they had brought to the

notice of the Bank in January 1987 itself. In response to such a communication, the Bank had sent reply dated 22nd January 1987 contending inter alia that the stock was sold through public auction on 9.1.87 and 13.1.87.

15. The petitioners examined one Shri Baburam Laljibhai Chaudhary as their witness. In his deposition, he reiterated the stand of the petitioners regarding the missing goods.

16. The Board of Nominees in its impugned judgment discussed the evidence on record at considerable length. The Board of Nominees found that the Bank did not disclose in any of its letters that the petitioners had lifted the goods and had undertaken to make the payment for the same but eventually did not do so. No such communication was made by the Bank in its letter dated 30th January 1985. The goods which was otherwise pledged could not have been released without recovery of the money. In any case, if the amount was not realized, the Bank should have immediately filed a police complaint and given notice also to the petitioners. The Bank

filed its suit on 6.4.86 and also prayed for attachment despite which in the suit, the Bank disclosed nothing about the said transaction. The Bank did not state in the plaint that the petitioners had taken the bank into confidence, lifted the goods but did not eventually pay the amount as promised. Ordinarily, when the goods were pledged, the Bank could have sold the same and realized the money. However, nothing has been done in this regard nor any disclosure made by the Bank in its plaint. The Board of Nominees also took into account the evidence on record suggesting the total quantity of goods lying the in the godown. The Board of Nominees also found that as per the register, in the account of the petitioners as on 30th June 1987, there was stock of certain goods. In the stock register,the stock of the goods was depleted. When it was found that the stock has gone down, the same should have given rise to police complaint. However, the same was not done. No explanation is coming forth from the plaintiff for this conduct. At least, this should have

been referred to in the notice given by the Bank. The Bank also did not produce the key register for opening the godown. When was the godown opened for the petitioners is not disclosed nor signature of the authorized representative of the petitioners was obtained. The Board of Nominees also found that some goods were sold to one Jindal and Company, however, the same was not sold by the petitioner, but by the Bank and no account was given by the Bank of the sale proceeds. The Board of Nominees also relied on the insurance of Rs.6 lacs taken by the Bank of the goods in question. The Board of Nominees also recorded the terms and conditions between the parties which provided that only after due verification and providing for sufficient margin that any goods would be released. One of the conditions was also that without recovery of the amount of goods, no goods will be released. Despite these findings, ultimately, the Board of Nominees passed an order directing the petitioners to pay a sum of Rs.1,27,477/- and further sum of Rs.2,77,825/-

ad noted above.

17. The Board of Nominees did not give any further reason to the twist in its ultimate order. It only recorded the contention of the learned advocate for the Bank that earlier also goods were released on the promise of payment within 15 days. Primarily on this ground, the Board of Nominees ignored its own findings on the basis of the evidence on record.

18. The Cooperative Tribunal while rejecting the appeal of the petitioners mainly relied on its observations that earlier, the petitioners had lifted goods without payment of money and thereafter raised dispute about the same. The Tribunal observed that the conclusion of the Board of Nominees are proper and the appeal was therefore required to be rejected. The Tribunal recorded that the petitioners failed to lead evidence to show that the Bank had though disposed of the goods had not accounted for the sale proceeds thereof. For similar reasons, review application of the petitioners also came to be rejected.

19.In my view, the courts below erred in allowing the suit in favour of the respondent Bank.

19.1It is not in dispute that the godown in which the goods of the petitioners were lying was in the custody of the respondent Bank since long. As goods pledged with the respondent Bank, the Bank had exclusive control over such godown long before the suit was filed. If before filing of the suit there had been any transaction between the parties with respect to such goods, the most natural conduct of the plaintiff Bank would have been to disclose the same in the suit itself. This was not done. It was only when the petitioners brought to the notice of the Bank that major portion of the goods of the petitioners lying in possession of the Bank was found missing that the Bank took up the stand which was also self-contradictory. It may be noted that in January 1987 when the petitioners visited the godown armed with the order of the Board of Nominees permitting them to lift 68 bags of wheat that the petitioners came to know about the missing goods. This was immediately brought to the notice of the Bank.

The Bank on one hand contended that the goods were sold in public auction with the knowledge of the petitioners. The Bank also contended that some of the goods was lifted by the petitioners with a promise to the Bank that the price thereof would be paid within 15 days. Significantly, there was no record or evidence to establish this fact. Admittedly, the Bank had neither issued any notice nor filed any complaint against the petitioners about the breach of its promise. Most natural and normal conduct of any party under such circumstances would have been to lodge a complaint with the police or at least at any rate enter into correspondence with the defaulting party. Primarily, it is extremely difficult to believe that the Bank would permit the petitioners to lift the goods without any payment with only a promise that the price would be paid later on particularly when the relation between the parties were already strained by then. The Bank had virtually lost faith in the conduct of the petitioners. Despite which the Bank wanted the courts below to believe that the goods were

permitted to be lifted on a mere promise to pay the sale proceeds within 15 days. The Bank had also wanted the courts below to believe that despite non-payment within 15 days, the Bank took no steps, made no complaint or created no records in this regard. Additionally I also found that the witness of the Bank had made important admissions before the courts below. He agreed that there is no record supporting this transaction. He had agreed that the petitioners were given the custody of the goods without recovery of any amount from them. Most significantly, he agreed that the Bank had taken out insurance of Rs.6 lacs in the year 1987. All these would lead to only one conclusion, namely, that the petitioners had not been given the possession of the goods by the Bank. Under the circumstances, the case the Bank was contending before the Board of Nominees that it is the petitioners who had sold the goods, heavy burden of establishing this fact was on the Bank. It was somewhat an extra-ordinary circumstance that the Bank was contending before the Court

that the responsibility for the missing goods was on the petitioners when the Bank had exclusive and total control over such goods. Initially, through the agreement by which the petitioners had pledged the goods and later on by virtue of attachment before judgment, the Bank had complete sway over such goods. If under such circumstances, the Bank wanted to establish before the courts below that the petitioners had appropriated the goods without depositing the amount before or after, the Bank had to lead cogent evidence in this regard. Quite apart from not being able to produce any evidence, the Bank was facing certain admissions made by its own witness. Most importantly, as noted earlier, the witness agreed that the Bank had taken out an insurance for Rs.6 lacs for the goods lying in the godown. No explanation came forth to suggest for what quantity of goods such insurance was taken. Except denying that the insurance did not cover the missing goods, the witness did not elaborate anything on this aspect of the matter.

20. Unfortunately, the Board of Nominees, though appreciated the evidence in its totality, in its conclusion came to a contradictory conclusion. As noted earlier, throughout the judgment, the Board of Nominees found that the petitioners were justified in pointing out that it is the Bank which is accountable for the goods in question. However, in the concluding portion, the Board of Nominees, relying only on the oral contention of the learned advocate for the Bank held that in the past also such transaction had taken place, awarded decree in favour of the Bank. The cooperative Tribunal relied mainly on the decision of the Board of Nominees. No independent reasons have been given upholding the stand of the Bank. When I find that the Board of Nominees committed an error in its ultimate conclusion, without much ado, the conclusion of the Cooperative Tribunal also would be rendered invalid.

21. I am conscious of the fact that this is a petition under Article 227 of the Constitution of India with its limitations. However, I find

that this is a rare case in which there were virtually no evidence before the courts below to draw a decree in favour of the Bank. In fact, the factual findings arrived at by the Board of Nominees were overwhelmingly in favour of the petitioners. Unfortunately, however, the ultimate conclusion without any further elaborate reasons went against the petitioners. On the available material on record, I do not find that the Board of Nominees or the Co-operative Tribunal could have passed the orders which are under challenge.

22. In the result, the petition is allowed. The impugned orders dated dated 11th September,1995 passed by the Board of Nominees as upheld by the judgment and order dated 7th October 1999 passed by the Cooperative Tribunal in Appeal No.363 of 1995 and the order dated 20th August 2001 passed by the Tribunal in Review Application filed by the petitioners are set aside. The petitioners have deposited certain amounts before and after filing of the petition pursuant to the decree passed by the Board of

Nominees. The entire amount shall be refunded to the petitioners by the respondent Bank with simple interest at the rate of 10 per cent per annum from the date on which such amount was deposited till its actual payment. It may be noted that the learned advocate Shri Joshi for the petitioners had not seriously pressed for the counter claim. He had stated at the outset that the petitioners would be satisfied with the portion of the suit of the Bank.

23. With the above directions and observations, the petition stands disposed of. Rule is made absolute accordingly with no order as to costs.

(Akil Kureshi, J.)

(vjn)